

JUN 04 2008

Luong v Mukasey 06-73580MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

IKUTA, Circuit Judge, dissenting:

We do not have jurisdiction to consider Luong's § 212(h) argument, either alone or as part of his theory of simultaneous relief, because he failed to exhaust it.

The IJ concluded that Luong was ineligible for § 212(h) relief, in part because Luong did not file form I-601, paperwork necessary for seeking such relief. In his appeal to the BIA, Luong stated that the IJ erred in reaching this conclusion, but then admitted he had not filed the paperwork and expressly abandoned his § 212(h) argument. The relevant portion of Luong's brief to the BIA states:

Luong, through present counsel, asserts that the IJ erred in not permitting him to proceed forward on applications for relief under former INA § 212(c) and under INA § 212(h). Luong argues that the simultaneous application of both waivers would act to remove all grounds of removability.

At this moment, given that the relative petition was not approved at the time of appeal and that a form I-601 for a section 212(h) waiver was not submitted into the record, Luong does not contest the IJ's finding regarding section 212(h) relief. Furthermore, Luong does not contest the other decisions entered by the IJ regarding voluntary departure, withholding of removal, or Article Three of the Convention Against Torture.

(emphasis added).

Because Luong expressly abandoned the § 212(h) issue, his appeal was not sufficient "to put the BIA on notice that he was challenging the IJ's . . .

determination” or to give “the agency . . . an opportunity to pass on th[e] issue.”

Zhang v. Ashcroft, 388 F.3d 713, 721 (9th Cir. 2004). Accordingly, Luong failed to exhaust the § 212(h) issue, we lack jurisdiction to consider it, and the petition should be denied. *See id.*